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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 444

BAGGETT TRANSPORTATION COMPANY, PETITIONER

v.

HUGHES TRANSPORTATION, INC., and
INTERSTATE COMMERCE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR INTERSTATE COMMERCE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Petition, App. B, pp. 29-36) is unreported. The opinion of the Court of Appeals for the Eighth Circuit (Petition, App. A, pp. 15-28) is reported at 393 F.2d 710 (1968).

JURISDICTION

The jurisdictional requisites are adequate as set forth in the Petition, at p. 2.

QUESTION PRESENTED

Whether a district court, under 49 U.S.C. § 322(b)(2), may enter a temporary injunction upon finding that the respondent motor carrier, to the injury of the complainant, has been operating and will continue to operate in clear and patent violation of sections 203(c) and 206 of the Interstate Commerce Act, notwithstanding that another district court has pending before it an action for judicial review of an order of the Interstate Commerce Commission requiring the motor carrier to cease and desist from such violations.

STATUTES INVOLVED

In addition to the statutes cited in the Petition (p. 2, App. C, pp. 37-39), the following statutes are also involved. The relevant portion of 28 U.S.C. § 1336 provides:

> (b) When a district court or the Court of Claims refers a question or issue to the Interstate Commerce Commission for determination, the court which referred the question or issue shall have exclusive jurisdiction of a civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission arising out of such referral.
>
> (c) Any action brought under subsection (b) of this section shall be filed within 90 days from the date that the order of the Interstate Commerce Commission becomes final.

The relevant portion of 28 U.S.C. § 1398 provides:

> (b) A civil action to enforce, enjoin, set aside, annul, or suspend, in whole or in part, an order

of the Interstate Commerce Commission made pursuant to the referral of a question or issue by a district court or by the Court of Claims, shall be brought only in the court which referred the question or issue.

STATEMENT

Respondent, Hughes Transportation, Inc., on December 15, 1967, filed a complaint with the district court, alleging that the petitioner, Baggett Transportation Company, was operating in clear and patent violation of the franchising requirements of the Interstate Commerce Act and praying that an injunction be entered, pursuant to 49 U.S.C. § 322(b)(2). Pending final disposition of its complaint, Hughes moved that a temporary injunction be entered. The Interstate Commerce Commission intervened and supported the complainant.

Baggett generally denied the allegations of the complaint and moved to dismiss or, in the alternative, to stay the proceedings pending the outcome of a suit it had brought in the United States District Court for the Northern District of Alabama, Civil Action No. 67-591, *Baggett Transportation Company* v. *United States*, to review the order in *Baggett Transportation Co.—Investigation of Operations*, 105 M.C.C. 628 (1967), in which the Commission required Baggett to cease and desist from similar violations of the Act. In turn, the Commission's proceeding commenced after another suit, was brought before the United States District Court for the Western District of Missouri, Civil Action No. 2000, *Tri-State Motor Transit Com-*

pany v. *Baggett Transportation Company*, and stayed, upon the Commission's filing of a notice under 49 U.S.C. § 322(b)(3), pending administrative determination of the issues posed.[1]

The district court received evidence and heard argument on the motions and, after having the matter under advisement, entered its temporary injunction against Baggett. In its memorandum opinion, the district court specifically noted, "Although the plaintiff makes reference in its motion to a decision of the Commission with regard to the portion of defendant's certificate here in question, the Court does not rest its decision in any way upon the conclusions of the Commission rendered in the matter before that body." The court concluded that Baggett, to the injury of Hughes, has been operating and will continue to operate in clear and patent violation of sections 203(c) and 206 of the Interstate Commerce Act and that, subject to the posting of appropriate bond by Hughes, Baggett's unlawful operations should be temporarily enjoined.

The Court of Appeals affirmed the judgment of the District Court.

ARGUMENT

The issue in the present case is uniquely of limited import, not warranting review by this Court on certiorari.

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[1] The Alabama court temporarily restrained enforcement of the Commission's cease and desist order after the Missouri court had declined, on application of Tri-State, to enjoin the Baggett operations, believing that the Commission's order would become operative by its own terms. Hughes is a wholly owned subsidiary of Tri-State.

1. Before 1965 a person injured by a motor carrier's violation of the franchising requirements of the Interstate Commerce Act was without judicial remedy.[2] That year the Congress amended the Act to vest the district courts with jurisdiction to enjoin clear and patent violations upon the complaint of an aggrieved party. 49 U.S.C. § 322(b)(2).

The statutory standard that enjoined violations must be "clear and patent" was a concession to the primary jurisdiction doctrine and the usual rule that the interpretation of its motor carrier operating authorities is best left to the Interstate Commerce Commission. *Service Transfer Co.* v. *Virginia*, 359 U.S. 171, 178 (1959). As the Senate report said:

> The purpose of this new paragraph is to afford injured parties a measure of self-protection against operations which are openly and obviously unlawful. The words "clear and patent" are intended as a standard of jurisdiction rather than a measure of the required burden of proof. No district court is to entertain any action except where the act complained of is openly and obviously for-hire motor carriage without authority under the sections enumerated. The language of section 4 is intended to make it clear that the courts would entertain only those suits which involve obvious attempts to circumvent operating regulation [S. Rep. 387, 89th Cong., 1st Sess. 7 (1965)].

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[2] A person could complain to the Commission, 49 U.S.C. § 304(c), and, of course, the Commission could apply to a district court for injunctive relief. 49 U.S.C. § 322(b)(1).

The Commission was permitted to intervene as of right in any such action and, upon the filing of a notice, to occasion a stay of further proceedings in the district court pending Commission consideration of the matter, but these steps were wholly discretionary with the Commission. See, also, H.R. Rep. 253, 89th Cong., 1st Sess. 11-12 (1965) and H.R. Rep. 810, 89th Cong., 1st Sess. 7 (1965).

The jurisdiction of the district court to enjoin a clear and patent violation of the Act in no way was made dependent upon a prior determination by the Commission that the respondent motor carrier had, indeed, violated the Act. Conversely, neither was such jurisdiction negated by an earlier finding by the Commission that the respondent motor carrier had operated in violation of the Act's provisions and that it should be ordered to cease and desist from continuing such operations. The self-help measure afforded an aggrieved party an additional remedy that, at the option of the Commission, would be apart and distinct from the administrative process.

2. Petitioner, which does not now dispute the merits of the district court's determination of its clear and patent violation of the Act, cannot demonstrate how the district court's entry of the temporary injunction denies it judicial review of the Commission's cease and desist order previously entered. Its complaint remains pending before the Alabama court, and in their joint answer the United States of America and the Interstate Commerce Commission do not deny the district court's jurisdiction to entertain it, though they urge that venue lies in the western district of Missouri.

What action the Alabama court may take on Baggett's complaint is wholly speculative, as, for that matter, is whether the Missouri court will enjoin permanently the Baggett operations that it temporarily restrained. Conceivably the ultimate outcome of the cases in the two courts will be that Baggett will be found to have operated unlawfully by the one but not by the other. However, such a divergence of views is not one unfamiliar to the courts or beyond their capacities to reconcile, possibly by plenary review in this Court after intervening appeals have been exhausted. If such is the situation, this Court at that time will have ample opportunity to consider the issues that petitioner now would present prematurely.

3. In the meantime, it would seem to be particularly appropriate that the assailed temporary injunction should have been entered by the very district court which entertained the suit that first gave rise to the administrative proceeding before the Commission. Had that court, upon the Commission's filing of the notice under 49 U.S.C. § 322(b)(3), specifically referred the matter to the Commission or even later construed its stay order as an order of referral to the Commission, there is little question that it alone would have had jurisdiction to review the Commission's cease and desist order. 28 U.S.C. §§ 1336(b) and 1398(b).[3] As the district court noted, at the time of its

[3] These sections were enacted to overcome the problem noted in *Pennsylvania Railroad Company* v. *United States*, 363 U.S. 202 (1960), and to assure to the referring court the exclusive jurisdiction to review the ensuing Commission order. In *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co.*,

[Footnote continued on page 8]

denial of Tri-State's application for a temporary restraining order after the Commission had ordered Baggett to cease and desist from its unlawful operations, "If I had had [section 1336(b)] in mind, I feel certain that I would have referred specifically to that section of the statute and I would have made the referral under that section of the statute, because it is perfectly obvious to me that it is certainly in the interests of an orderly disposition of this type of matter that one court have the entire matter before it so as to avoid possible conflicting orders, conflicting action, conflicting considerations and problems as to who has what authority and under what circumstance, which court should go first and second, and so on." Petition, p. 41.

The somewhat peculiar posture of this case, largely of the petitioner's devising, is without precedent in the three years of litigation that have followed the Act's amendment and, in our judgment, is not likely to reoccur. Certainly, it does not now occasion review by this Court.

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*[Continued]

383 U.S. 576 (1966), this Court recognized that the right to direct judicial review of a Commission order was not absolute and, under 49 U.S.C. § 16(2) is available to a carrier aggrieved by an award of reparations only in a cross-action suit brought by the shipper upon such order.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 320453 211